POLMAN B.V.

v.

ALPHA-ASIATIC TIMBER PTE. LTD.

HIGH COURT, SINGAPORE
JOSEPH GRIMBERG JC
[APPEAL NO. 2680 OF 1987]
6 APRIL 1988

CIVIL PROCEDURE: *Application for summary judgment - Sale and purchase of timber - Delay in shipment - Written communication between parties - Whether plaintiff estopped from enforcing rights.*

This was an appeal against the decision of the registrar who gave the defendant unconditional leave to defend upon hearing an application for summary judgment. The subject matter of the dispute was two contracts whereby the plaintiff agreed to purchase from the defendant timber. The plaintiff alleged that the defendant failed to deliver timber in accordance with the two contracts. The plaintiff conceded that they have accepted timber in respect of the first contract after the stipulated period. The defendant contended that they were prevented from shipping the timber due to causes beyond their control and that the plaintiff had waived the dates of shipment and were estopped from insisting on delivery within the stipulated period. There was written communication between the parties regarding the delay in shipment and this was followed by negotiations to arrive at a settlement.

Held:

From the correspondence between the parties, the plaintiff did not waive their contractual rights and were not estopped from enforcing their rights. There was no evidence to support the defendant's contention that the delay in shipping was due to causes beyond their control. The defendant was given conditional leave to defend.

[Appeal allowed with costs.]

For the plaintiffs/appellants - Lai Siu Chiu
For the defendants/respondents - Charles Ng

JUDGMENT

Joseph Grimberg JC:

The plaintiffs are incorporated in the Netherlands and the defendants are incorporated in Singapore. Both are in the timber business.

By a contract dated the 11 December 1985 ("Contract 1"), the plaintiffs agreed to purchase from the defendants 1,668 cubic metres of timber at prices ranging between US$257 and US$265 per cubic metre. Shipment was to be by lots - lot A comprising 1,055 cubic metres to be shipped before 15 February 1986 and lot B comprising 613 cubic metres to be shipped by the end of March 1986. Payment was to be by sight letter of credit.

By a second contract between the parties dated 31 December 1985 ("Contract 2"), the plaintiffs agreed to buy, and the defendants agreed to sell to the plaintiffs, a further 988 cubic metres of timber at prices ranging between US$257 and US$265 per cubic metre, for shipment March/ April 1986. Payment, as in the case of Contract 1, was to be sight letter of credit.

The plaintiffs issued a writ against the defendants on 13 October 1987 claiming US$129,026.28 as damages for breach of contract. They alleged that the defendants had failed to ship 745 cubic metres of timber under Contract 1, and that they had failed to ship any timber at all under Contract 2.

The defendants duly entered an appearance in the proceedings commenced against them, whereupon the plaintiffs applied for summary judgment. The application came on before the learned Registrar on 30 November 1987. He gave the defendants unconditional leave to defend. The plaintiffs appealed, and their appeal was heard by me on 6 April 1987. I allowed the appeal, set aside the order of the Registrar and granted the defendants leave to defend the plaintiffs' claim conditional upon the amount claimed being paid into Court within 30 days, or the defendants furnishing the plaintiffs with a guarantee for that amount within the 30 day period, in terms acceptable to the plaintiff's solicitors or in default of acceptance, approved by the Registrar. I ordered the defendants to pay the costs of the appeal.

Those orders are now appealed against.

The defendants do not dispute the terms of Contracts 1 and 2 and, for their part, the plaintiffs concede that they had accepted shipment of the quantities of timber delivered under Contract 1 well after the contractual dates for shipment stipulated under that contract.

The defendants set up Clouse 1 of the general terms and conditions printed on the reverse of the Contracts with reference to their "delay" in shipping. It reads:

> Sellers are not responsible for delay in performance of this contract for any cause of whatsoever nature, kind (SIC) beyond control of the sellers, whether of a like or a different nature.

The defendants contended, first, that they had been prevented from shipping the remaining quantities of timber under Contracts 1 and 2 "by reason of heavy rainfall and strikes which adversely affected its supply, all of which were due to causes beyond the defendant's control". The defendants' other argument was that the plaintiffs, by their conduct, waived the dates of shipment stipulated by Contracts 1 and 2; alternatively by reason of that conduct, that the plaintiffs are estopped "from insisting on the said dates of shipment". I have quoted from the affidavit of the defendants' Madam Lim Kim Moi, filed on 26 November 1987. There was also an unsubstantiated assertion by Counsel for the defendants concerning the non-receipt of correspondence.

There were altogether four affidavits before me which went to the merits. These affidavits, and their respective exhibits, told the following story.

On 5 February 1986, some 10 days before the defendants were due to ship lot A under Contract 1, they advised the plaintiffs by telex that they were doing their best to ship "by end of this month due to heavy rain". On 19 February 1986 the defendants informed the plaintiffs by telex, with regard to Contract 2, that "due to heavy rain thus scarcity of log supplies" they were "unable to fulfil". The telex went on to state that FOB prices had risen "at an alarming rate" and that the defendants had not been able to close with suppliers. The telex closed: "We sincerely regret for the inconvenience caused and are very sorry to have failed you".

It is apparent from subsequent telexes that the plaintiffs continued to press for shipment under both contracts.

By a telex dated 28 May 1986 the plaintiffs informed the defendants that the plaintiffs had opened a fresh letter of credit, providing for shipment by 15 July and 6 August 1986 for lots A and B under Contract 1. They stated: "This of course means you have to complete before this date as we have no possibility to extend a reopened letter of credit. "As regards Contract 2, the plaintiffs stated: "Please keep us informed with advices so that we can L/C for this contract accordingly..."

In the event, in purported compliance with Contract 1, which called for shipment of a total of 1,055 cubit metres of timber before 15 February 1986, and a further 613 cubic meters before the end of March 1986, the defendants shipped 802 cubic meters on 15 July 1986 in respect of lot A, and 99.6 cubic meters on 26 May 1986 in respect of lot B. The plaintiffs accepted these shipments, and by their telex dated 15 July 1986, they placed on record, as regards Contract 1 lot B, that it was "very difficult to accept any further delay". They required the defendants' "confirmation of shipment 31 August 1986 latest". As regards Contract 2, the plaintiffs stated: "That is intended for shipment April 1986 latest, not yet mentioned but have to request you to arrange shipment before 15 August 1986 and 30 September 1986. Please confirm".

By this telex, therefore, the plaintiffs gave notice to the defendants of the extended dates by which they required the balance of the shipment due under Contract 1, and the whole of the shipment due under Contract 2, to be effected.

On 28 July 1986 the defendants' S.K. Khoo promised to write to the plaintiffs concerning Contracts 1 and 2, saying "please believe we have done our utmost from this end". By a letter dated 1 August 1986, the defendants repeated that the delay in effecting shipment of the balance of logs due under Contract 1 was due to heavy rain. As regards their failure to make any shipments at all under Contract 2, the defendants asserted "shortage of logs and prolonged rainy season in Padang". They were continuing to press for "early supply" from their Indonesian source. The defendants made no reference at all to the revised dates of shipment stipulated for by the plaintiffs in their telex of 15 July 1986.

There is a gap in the telexes between mid-August and early September 1986, but it is apparent from terms of the plaintiffs' telex to the defendants dated 4 September 1986 that the defendants had not shown signs of being able to ship the quantities called for under both Contracts by the end of September, the date stipulated by the plaintiffs for shipment of all quantities due under Contract 2. The plaintiffs therefore stated: "Trust you will be able to complete balances by October 1986 latest as well and kindly await your cooperation/ confirmation, thanks".

The defendants did not reply to the plaintiffs' telex of 4 September 1986 until 29 September 1986, and that reply is not among the telexes exhibited to the affidavits. However, the plaintiffs telexed the defendants on 1 October 1986, in the following terms:

> Re Bal Contr. 054 (i.e. Contract 1) - Very disappointed once again by your attitude. The longer you wait the harder it will be to have balances covered as we now are facing some difficult months with limited log supplies as already mentioned before it cannot be our intention to renegotiate old contract prices because you and/or your sawmill failed to supply. Cannot understand why such an esteemed company as Alpha Asiatic failed to honour the contracts in their first business. P1s be convinced of your responsibility towards us and put some pressure on your sawmill to produce bal. contr. 054. If you do not succeed there will be no alternative for you but to cover additional with other sawmills at higher prices.
>
> Re Contr. 055 (i.e. Contract 2) - Situation for this item even worse as you failed to cover whole volume with any sawmill at all.

> In fact was prepared to conclude some additional volumes to make bal. of old contracts more acceptable for the sawmill(s).
>
> P1s be informed that we have shown enough patience and that we will take further steps if we do not receive an acceptable alternative how to come to a solution. As such we already informed the Indonesian Authorities and they will surely take the necessary but unpleasant steps to avoid this kind of business in the future.
>
> We think that those who enter the business should be held responsible for the contracts they made, whatever it is.
>
> We very much regret the way things are developing, however you leave us no choice but to take action.
>
> To assist Inhutani to complete outstanding we have extended L/C IA 1529200 as you requested.

The plaintiffs received no response to this telex, and by their telex to the defendants dated 21 November 1986, they stated with reference to the unfulfilled contracts:

> Should you not be in a position to honour these contracts we are prepared to give you the opportunity to buy off the contracts. In this case, we will have to cover balances elsewhere at the correct price of US Dlr. 365/M3. As such we then expect to receive your bank draft for 1670 X USD100 = total USD167,000.

In a word, the plaintiffs were prepared to release the defendants from their remaining obligations under the two Contracts, in consideration of the payment by the defendants to the plaintiffs of US$167,000.

At or about this time, the plaintiffs arranged for the letter of credit they had opened to be amended. The defendants were advised by the Banque Nationale de Paris on 4 December 1986 as to the terms of the amendment, as follows:

> - latest date of shipment/despatch extended until 28 February 1987. - expiry date now to read 21 March 1987 all other terms and conditions remain unchanged.

On 16 December 1986 the plaintiffs wrote to the defendants, stating that the situation was "absolutely unworkable for us ... as we are faced with an enormous volume, far overdue, but yet to be shipped". They suggested that the real reason for the defendants' failure to ship was the increase in price of the timber, and asserted that it was the defendants "duty to pay for the price difference or to cover elsewhere to come to shipments against our contracts". The letter went on:

> Now, it's about one year ago we made our contracts, and we think we have shown enough patience towards your company to get our timber shipped or to come with acceptable alternatives.

-the latter a reference to the compensation suggested by the plaintiffs in their telex of 20 November 1986. The letter continued:

> Therefore we have to ask you to come with a schedule of your intended shipments against our contracts without any further delay. Those volumes which are not shipped after 1 March 1987, we have to cover elsewhere at the at that time current prices. Naturally we are prepared as well to recover the total outstanding position without any further delay as both parties then have no longer any misunderstanding about their positions.
>
> In that case we have to cover total outstanding volume elsewhere at the current price of US$370/M3, for which we have to ask for your credit amount of at least 1725 x US$100/M3 makes total US$172,500.

> After receiving this amount your company will be totally free from any other obligation towards our company.
>
> However, should you not come with any proposal in line with our suggestions or an alternative which is acceptable and satisfying for our company, you leave us no choice but to undertake jurisdical steps.

By their letter of 16 December 1986 the plaintiffs were telling the defendants, it seemed to me, that outstanding shipments were to be effected by 28 February 1987, consistent with the amended letter of credit, unless the defendants were prepared to compensate the plaintiffs in the sum of $172,500.

The defendants replied by letter of 22 December 1986, in the following terms:

> We refer to your letter of 16 December 1986 and wish you a Merry X'mas. Unless you agree to increase the price as a result of the increase in prices, it is difficult to obtain the supplies now. May be in March `87 we hope prices will come down which is why we explained to you a month ago. We asked you to extend the L/C to March 1987 which we are glad we have received from Nederlansche Middenstandsbank N.V.
>
> After the rainy season last month, the suppliers were short in supply of logs and they are now refusing to sell at the old price.
>
> We hope you understand the position and Mr. Koh will explain to you further in Holland.

This letter manifested a virtually total indifference on the defendants' part as regards fulfilling their outstanding obligations under the two Contracts. The defendants were not prepared to ship unless the plaintiffs agreed to an increase in price.

There followed a visit to Holland by the defendants' Kho Tjin Ho, who is known as "Chok Koh". Discussions took place with the plaintiffs' managing director, Theo C. Bennes, in an effort to resolve matters. These discussions, which apparently focussed on the compensation which the plaintiffs were prepared to accept, came to nothing. Following Koh Tjin Ho's return to Singapore, desultory correspondence between the parties continued, but no solution was reached, the defendants by their letter of 21 March 1987 refusing to pay compensation of US$25,000, declining to regard the contracts "as cancelled", and stating that it would be "possible" to ship against "Contract 2 on June/July 1987", that is to say well over a year after the dates agreed upon by that Contract, and even then not at the contracted price.

Not surprisingly, this was unacceptable to the plaintiffs. Bennes visited Singapore in June 1987, hoping to further explore the possibility of a settlement, but Kho failed to contact him despite a number of messages left for him by Bennes.

In argument before me, Counsel for the defendants asserted that the plaintiffs, having agreed to several extensions of time for shipment, it was incumbent upon them to give the defendants reasonable notice of the re-imposition of a date by which shipment was required. The plaintiffs, he asserted, had failed to give reasonable notice.

It seemed to me, on the evidence, that the plaintiffs had granted the defendants indulgence after indulgence, but that by December 1986 their patience was exhausted. They told the defendants that if the outstanding quantities of timber were not shipped by 28 February 1987 the plaintiffs would, after 1 March 1987, have to "cover elsewhere" unless the defendants were prepared to compensate the plaintiffs in the sum of US$172,500, the plaintiffs having arranged for the letter of credit to be amended to allow shipment by 28 February 1987. I found it difficult to accept that this notice was anything but reasonable.

None of the correspondence emanating from the plaintiffs struck me as amounting to a waiver of their contractual rights, or to conduct which gave rise to an estoppel.

As far the defendants' contention that their delay in shipping was due to causes beyond their control, I would only say that there were no more than bare assertions of bad weather and strikes, with no evidence to support them. In any event, the case did not concern delay in shipping, so much as a complete failure to ship a substantial quantity of the timber contracted for.

I concluded that there was little or no substance in the defence raised, and accordingly made the order to which I have referred, the defendants not having joined issue on the quantum of the plaintiffs' claim. I saw no reason why the plaintiffs should not have the costs of their successful appeal from the order of the learned Registrar, in accordance with the normal principle that costs should follow the event.

Also found at [1988] 2 CLJ 152